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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DANIEL MONTANO, an individual, and ANNIE MONTANO, an individual, Plaintiffs, v. WORLD WIDE CREDIT CORPORATION, a corporation; FIRST FEDERAL BANK OF CALIFORNIA, a National Bank; SAM SMARGON, an individual; RON FEINBERG, an individual; and DOES 1 through 20, inclusive, Defendants.	CASE NO. 08 CV 1183 JM (RBB) **REPLY OF DEFENDANT FIRST FEDERAL BANK OF CALIFORNIA IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** Date: September 5, 2008 Time: 1:30 p.m. Crtrm.: 16

Defendant First Federal Bank of California ("First Federal") hereby submits the following Reply Memorandum of Points and Authorities in support of its Motion to Dismiss Plaintiffs Daniel Montano and Annie Montano's (collectively, "Plaintiffs") First Amended Complaint ("FAC"):

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I.

SUMMARY OF ARGUMENT

Plaintiffs' Opposition ("Opposition") contains several key admissions. These admissions, when taken in consideration with Plaintiffs' failure to address the issues in the Motion to Dismiss ("Motion"), lead to the dismissal of the FAC:

1. Plaintiffs admit that their allegations are based on the California Rosenthal Act, not the Fair Debt Collection Practices Act ("FDCPA"). (Opposition, p. 4, ll. 19-20.)

2. Plaintiffs admit that they have not set forth sufficient facts to support a claim of principal/agency and of conspiracy regarding their allegations against First Federal. (Opposition, p. 3, ll. 8-10.)

3. Plaintiffs admit that First Federal cannot be held liable for breach of fiduciary duty.

4. Worldwide is an agent of Plaintiffs, not First Federal.

5. Plaintiffs fail to submit any facts to support a fiduciary relationship between Plaintiffs and First Federal. The relationship between Plaintiffs and First Federal is that of a creditor and debtor.

6. First Federal's has a contractual right to foreclose per the loan documents.

7. Any claim based on the implied covenant of good faith and fair dealing is limited to the express terms of the contract and cannot impose new terms.

8. First Federal is not a "debt collector" under the Rosenthal Act.

II.

PLAINTIFFS ADMIT THAT THEY HAVE NOT SUFFICIENTLY SET FORTH FACTS TO SUPPORT A CLAIM OF PRINCIPAL/AGENCY AND OF CONSPIRACY

In their Opposition, Plaintiffs admit the following: "...Defendants correctly state that Plaintiffs have not set forth sufficient facts to support a claim of principal/agency and of conspiracy regarding these particular allegations as against First Federal." (Opposition, p. 3, ll. 8-10.) As such, the claims of conspiracy to breach fiduciary duty and conspiracy to

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defraud must fail.

III.

PLAINTIFFS ADMIT THAT THEIR ALLEGATIONS ARE NOT BASED ON THE FAIR DEBT COLLECTION PRACTICES ACT

In their Opposition, Plaintiffs admit the following: "Plaintiffs' allegations are based on the California Rosenthal Act, not the FDCPA." (Opposition, p. 4, l. 19.) As such, the cause of action alleging violation of 15 U.S.C. section 1692(b)(6) must fail.

IV.

HOLA PREEMPTS ALL STATE LAW CLAIMS

Plaintiffs allege that Fenning v. Glenfed Inc. (1995) 40 Cal.App.4th 1285 is dispositive on the matter. However, Plaintiffs merely repeat dicta from Fenning without explaining the facts and circumstances surrounding the case or how it applies to the case at hand. Fenning involved claims for fraud related to a bank's sale of uninsured investment securities, not its deposit or lending-related activities. In that case, the Court found that the fraud claims were not preempted by HOLA because the claims did not involve the normal operations of a savings association. The case does not apply here.

The gravaman of the FAC is that First Federal was wrong in not allowing Plaintiffs to modify their loan. All of the claims against First Federal are based upon this allegation. As the California Court of Appeal held in Weiss v. Washington Mutual Bank (2007) 147 Cal. App. 4th 72, 77:

> Although 12 C.F.R. § 560.2(c) exempts state tort laws that only incidentally affect the lending operations of federally regulated institutions, the 'incidentally affect" analysis is triggered only when dealing with an activity that is not listed in 12 C.F.R. ¶ 560.2(b). According to the OTS, '[w]hen analyzing the status of status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed [among the illustrative examples of preempted state laws] in paragraph (b) [of 12 C.F.R. § 560.2]. **If so, the analysis will end there; the law is preempted...Any doubt should be solved in favor of preemption."** (Emphasis in original.)

In Weiss, borrowers alleged that they were misled as to the amount of a prepayment penalty. Because prepayment penalty provisions were listed among the illustrations of preempted state laws in 12 C.F.R. § 560.2(b), the appellate court affirmed the trial court's decision to grant the bank's judgment on the pleadings. The United States Central District Court followed and cited the Weiss decision in In Re Washington Mutual Overdraft Protection Litigation (2008) 539 F.Supp.2d 1136, 1154-1155, finding that plaintiffs' state law claims, including Business and Professions Code section 17200, were preempted by HOLA and dismissed the state law claims. Similarly, the state law claims in the instant action must be dismissed. Under 12 C.F.R. section 560.2(b)(4), except as provided in section 560.110, the types of state laws preempted by paragraph (a) of 12 C.F.R. section 560.2 include, without limitation, state laws purporting to impose requirements regarding: "[t]he terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan." By basing their claims on First Federal's alleged refusal to modify their loan, Plaintiffs are asking this Court to adjudicate terms of credit, including adjustments to the interest rate to lower their monthly payments, the payments due, and the circumstances under which a loan may be called due and payable. This is exactly what 12 C.F.R. section 560.2(b)(4) says is preempted by HOLA.

V.

THERE IS NO FIDUCIARY RELATIONSHIP BETWEEN PLAINTIFFS AND FIRST FEDERAL

There is no fiduciary relationship between a bank and its borrowers. Plaintiffs argue that First Federal "owed to [them] a fiduciary duty to make the fullest disclosure of all material facts that might affect Plaintiffs' interest in entering into the loan transaction described above." (FAC, p. 10, ¶ 70.) However, Plaintiffs fail to allege any special relationship between them and First Federal giving rise to breach of fiduciary duty. Plaintiffs' only argument in support of their claim for fiduciary duty is that "First Federal (as Principal) may be held liable for the acts Worldwide (as Agent)." (Opposition, p. 6, ll.

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4-5.) This argument fails for two reasons. First, case law provides that World Wide is an agent of the Plaintiffs, not First Federal. (See Wyatt v. Union Mortgage Company (1979) 24 Cal.3d 773, 782.) Second, Plaintiffs admit that they "have not plead these facts [for conspiracy to breach fiduciary duty] sufficiently…" (Opposition, p. 6, l. 6.)

Furthermore, "[a]n alleged coconspirator must be legally capable of committing the tort charged. (Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 511.) He or she must owe a duty to the plaintiff recognized by law and be potentially subject to liability for breach of that duty. (Id.) As stated above, First Federal did not owe any duty, fiduciary or otherwise, to Plaintiffs. Furthermore, any duty owed by codefendants cannot be imputed onto First Federal by virtue of a conspiracy claim. (Everest Investors 8 v. Whitehall Real Estate ld. Partnership XI (2002) 100 Cal.App.4th 1102, 1107.) As a result, the claim for breach of fiduciary duty against First Federal must fail.

VI.

PLAINTIFFS FAIL TO STATE FACTS UPON WHICH A CLAIM CAN BE MADE UNDER THE ROSENTHAL ACT

A. Plaintiffs Admit that Civil Code section 1812.700 Does Not Apply to First Federal

Civil Code section 1812.700 requires third-party debt collectors to include a notice provision in an initial written communication. As stated in the Motion to Dismiss, Plaintiffs fail to allege that First Federal attempted to collect any debt owed to a third party. (Motion to Dismiss, p. 8, ll. 17-18.) Plaintiffs fail to address, much less rebut, this argument. As Federal Rule of Civil Procedure Rule 8(b)(6) provides: "Effect of Failing to Deny. An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied." As a result, Plaintiffs' failure to deny should constitute an admission that this section does not apply to First Federal.

B. First Federal is Not a Debt Collector under the Rosenthal Act

Plaintiffs allege that First Federal admitted that it was collecting on a debt.

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(Opposition, p. 4, l. 25.) In fact, what the Motion actually says is that "...even assuming *arguendo* the communications between First Federal and Plaintiffs were for the collection of a debt, since First Federal was merely attempting to collect on a debt owed to it, and not a third person, it still is not a 'debt collector' as defined under the statute." (Motion to Dismiss, p. 2, ll. 26-28.) Plaintiffs deliberately leave out the pertinent portion of the sentence "assuming arguendo," which clearly poses the sentence as a hypothetical, not an admission. In fact, on page 9 of the Motion to Dismiss, First Federal clearly states that the conversations were not for the purpose of debt collection, but based on Plaintiffs' request for a loan modification. (Motion to Dismiss, p. 9, ll. 6-8.)

First Federal is not a debt collector under the Rosenthal Act. Since the stated purpose of the Robbins-Rosenthal Fair Debt Collection Practices Act is to "prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts...," it follows that acts alleged in violation of this title must be for the collection of consumer debts. (Civ. Code § 1788.1(b).) Plaintiffs have failed to allege that any of the acts taken by First Federal were to collect on a debt. In fact, every allegation against First Federal involves Plaintiffs' request for a loan modification, not debt collection.

C. Plaintiffs Fail to State Facts Upon Which a Legal Claim for Violation of 1788.17 Can Be Made

Throughout the FAC, Plaintiffs fail to allege that First Federal ever contacted them for the purposes of debt collection. In fact, each contact alleged between Plaintiffs and First Federal was clearly for the purpose of requesting loan modification. Even the facts themselves are under the caption of "Plaintiffs' Efforts to Obtain a Loan Modification." (FAC, p. 6, l. 15.) Since the stated purpose of the Robbins-Rosenthal Fair Debt Collection Practices Act is to "prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts...," it follows that acts alleged in violation of this title must be for the collection of consumer debts. (Civ. Code § 1788.1(b).) Plaintiffs have failed to allege that any of the contacts between the parties was for debt collection.

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Furthermore, Plaintiffs fail to state sufficient facts to constitute a violation of the individual sections. For each of the separate sections, Plaintiffs merely allege that First Federal violated the section by reciting the section language. For example, 15 U.S.C. section 1692(d) provides that a "debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." It goes on to provide examples of conduct which is a violation of the section. Plaintiffs, instead of stating which conduct First Federal allegedly committed in violation of the section, merely conclude that First Federal "violated California Civil Code § 1788.17 by engaging in conduct the natural consequence of which is to harass, oppress, and abuse persons in connection with the collection of the alleged debt a violation of 15 U.S.C. § 1692(d)." (FAC, p. 9, ¶ 68(b).) This allegation is conclusory and insufficient to state a claim under 15 U.S.C. section 1692(d). (See Gorman v. Wolpoff & Abramson, LLP (N.D. Cal. 2005) 370 F.Supp.2d 1005, 1012 ["Gorman's allegation that he received 'harassing, threatening, abusive, oppressive, and annoying telephone calls' is conclusory and insufficient to state a claim based on § 1692d"].) Plaintiffs do the same with respect to their allegations of violation of 15 U.S.C. sections 1692(d), 1692(e)(10), 1692(f), and 1692(g)(a). As a result, Plaintiffs fail to state a claim under these sections as well.

VII.

THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS LIMITED TO THE EXPRESS TERMS OF THE CONTRACT

"If there exists a contractual relationship between the parties... [the] implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (Racine & Laramie, Ltd. v. Dep't. of Parks & Recreation (1992) 11 Cal.App.4th 1026, 1032; emphasis added.) Plaintiffs' argument that First Federal "impliedly invited requests for modification," does not equate to an agreement to waive their rights or modify a loan. Finally, Plaintiffs fail to point to any express term in the contract mandating modification. As a result, the claim for breach of the implied covenant of good faith and fair dealing

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must fail.

VIII.

PLAINTIFFS ADMIT THAT FIRST FEDERAL OFFERED TO MODIFY ITS LOAN

As noted above, First Federal was not obligated to modify the loan. Nonetheless, Plaintiffs admit that First Federal did in fact offer modification: "First Federal later offered a modification…." (Opposition, p. 2, l. 17.) As a result, First Federal complied fully with the covenant of good faith and fair dealing.

IX.

FIRST FEDERAL HAS A CONTRACTUAL RIGHT TO FORECLOSE ON THE PROPERTY

The fact remains that First Federal was not obligated to modify the loan. By the terms of the Deed of Trust, once the loan was in default, First Federal was entitled to accelerate the loan. (RJN, Exhibit "A," p. 4, ¶ 14.) "Contracts are enforceable at law according to their terms. The covenant of good faith and fair dealing operates as a kind of safety valve to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language. It does not impose any affirmative duty of moderation in the enforcement of legal rights." (Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 479; internal quotations omitted; emphasis added.) A party has a legal right to enforce its contractual rights.

X.

WORLD WIDE IS AN AGENT OF PLAINTIFFS, NOT FIRST FEDERAL

Plaintiffs do not deny that World Wide is their agent. In fact, Plaintiffs admit that they "on or about July 2, 2007, [they] contacted World Wide and spoke with SMARGON." (FAC, p. 5, ¶ 22.) The FAC concentrates on the alleged misdeeds of World Wide: "Defendant Worldwide brokered the loan with Defendant First Federal as the lender. Worldwide failed to disclose the provisions of interest rate, late charges, increasing interest rate, and the 110% amortization provision." (Opposition, p. 2, ll. 7-8.) "At

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closing, Worldwide failed to explain the documents…." (Opposition, p. 2, l. 10.) Since Worldwide is an agent of the Plaintiffs, Plaintiffs are liable for Worldwide's alleged misdeeds, not First Federal.

Plaintiffs also argue that "First Federal or Worldwide falsified Plaintiffs' income." (Opposition, p. 2, l. 9.) However, this is in direct contrast to the FAC which states that "…SMARGON falsified Plaintiffs' income for purposes of qualifying Plaintiffs for the loan." (FAC, p. 5, ¶ 31.) "In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." (Schneider v. California Dept. of Corrections (9th Cir. 1998) 151 F.3d 1194, 1197; see also 2 Moore's Federal Practice, § 12.34[2] (Matthew Bender 3d ed.) ("The court may not . . . take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a).").) The focus of any Rule 12(b)(6) dismissal is the complaint. Thus, the allegation in the FAC reigns.

The fact remains that World Wide was an agent of the Plaintiffs. Since Smargon was an employee of World Wide, and World Wide is an agent of Plaintiffs, the Plaintiffs are responsible for any misconduct by World Wide, including the falsified information submitted to First Federal.[1]

XI.

THERE IS NO CLAIM UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200

Plaintiffs fail to state a claim under Business and Professions Code section 17200. First, as the Ninth Circuit in In Re Washington Mutual Overdraft Protection Litigation (2008) 539 F.Supp.2d 1136 held, all state law claims, including Business and Professions

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[1] Furthermore, Plaintiffs signed the loan documents. (Opposition, p. 2, ll. 10-11.) It is a basic tenet of contract law that there is a duty to read contracts prior to execution. It is also understood that the signature means that the party understands and agrees with the terms.

Code section 17200 are preempted by HOLA. In addition, since there is no tortious conduct or statutory violation by First Federal, there is no UCL claim. Without a valid underlying claim, the UCL "unlawful" practices claim must also fail. (See Ingels v. Westwood One Broadcasting Services, Inc. (2005) 129 Cal.App.4th 1050, 1060.)

XII.

PLAINTIFFS FAIL TO PLEAD FACTS JUSTIFYING AN AWARD OF PUNITIVE DAMAGES

Plaintiffs fail to plead facts justifying an award of punitive damages against First Federal. As Federal Rule of Civil Procedure Rule 8(b)(6) provides: "Effect of Failing to Deny. An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied." Therefore, Plaintiffs' request for punitive damages should be stricken. (Woodland Production Credit Assn. v. Nicholas (1988) 201 Cal.App.3d 123, 129.)

XIII.

CONCLUSION

Based on the foregoing, as well as the arguments set forth in the moving papers, this Motion should be granted.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1875 Century Park East, Suite 800, Los Angeles, California 90067-2512.

On August 29, 2008, I served true copies of the following document(s) described as **REPLY OF DEFENDANT FIRST FEDERAL BANK OF CALIFORNIA IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare that I am employed in the office of a member of the bar of this Court, at whose direction this service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 29, 2008, at Los Angeles, California.

Mae T. Sasina

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